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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	CC-15-1281-KiTAL
6	ROGELIO FRANCO,	)	Bk. No.	2:15-bk-12214-WB
7	Debtor.	)		
8	_____	)		
9	ROGELIO FRANCO,	)		
10	Appellant,	)		
11	v.	)		
12	UNITED STATES TRUSTEE;	)		
13	TIMOTHY YOO, Chapter 7	)		
14	Trustee,	)		
	Appellees.	)		
	_____	)		

MEMORANDUM<sup>1</sup>

Argued and Submitted on May 19, 2016,  
at Pasadena, California

Filed - June 2, 2016

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Julia W. Brand, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
Appellant Rogelio Franco on brief;<sup>2</sup> Nancy S. Goldenberg argued for appellee, United States Trustee.  
\_\_\_\_\_

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<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

<sup>2</sup> Appellant Rogelio Franco failed to appear at oral argument.

1 Before: KIRSCHER, TAYLOR and LANDIS,<sup>3</sup> Bankruptcy Judges.

2

3 Appellant, chapter 7<sup>4</sup> debtor Rogelio Franco, appeals an order  
4 dismissing his case for "cause" under § 707(a). The court  
5 dismissed his case with prejudice and imposed a one-year refiling  
6 bar under §§ 349(a) and 105(a). We AFFIRM.

7

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

8 Debtor filed a chapter 13 bankruptcy petition on February 13,  
9 2015, pro se (case no. 15-12214), which included a signed copy of  
10 Exhibit D – Individual Debtor's Statement of Compliance with  
11 Credit Counseling Requirement. In Exhibit D, Debtor asserted  
12 under the penalty of perjury that "[W]ithin the 180 days before  
13 the filing of my bankruptcy case, I received a briefing from a  
14 credit counseling agency approved by the United States trustee or  
15 bankruptcy administrator that outlined the opportunities for  
16 available credit counseling and assisted me in performing a  
17 related budget analysis, and I have a certificate from the agency  
18 describing the services provided to me." Debtor did not claim  
19 that any of the three exceptions to the prepetition credit  
20 counseling requirement under § 109(h) applied. Debtor later  
21 converted his case to chapter 7; Timothy Yoo was appointed as  
22 trustee.<sup>5</sup>

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24 <sup>3</sup> Hon. August B. Landis, Bankruptcy Judge for the District  
of Nevada, sitting by designation.

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26 <sup>4</sup> Unless specified otherwise, all chapter, code and rule  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

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28 <sup>5</sup> Debtor named Mr. Yoo as an appellee. Debtor has alleged  
(continued...)

1 Prior to this case, Debtor, together with his wife, filed at  
2 least four other bankruptcy cases within the past four years.<sup>6</sup> In  
3 the first case, a chapter 7 case, Debtor received a discharge  
4 along with his wife on August 23, 2011. The fourth case, a  
5 chapter 7 case later converted to chapter 13, was still pending  
6 when Debtor filed the instant case. Between Debtor's third and  
7 fourth cases (filed in 2011 and 2014, respectively), his wife  
8 filed two bankruptcy cases (alone), one in 2012 and the other in  
9 2013, receiving a discharge in the second case on February 24,  
10 2014, despite having received a chapter 7 discharge less than  
11 three years before.<sup>7</sup>

12 On February 17, 2015, the bankruptcy court issued a Notice of  
13 Non-Entitlement to Discharge to Debtor. It is presumed Debtor  
14 received it; he has not argued to the contrary.

15 Debtor filed his certificate of credit counseling on  
16 February 27, 2015, wherein he stated that he had received credit

17 \_\_\_\_\_  
18 <sup>5</sup>(...continued)  
19 mistreatment by Mr. Yoo while his case was in chapter 7. Mr. Yoo  
20 filed a statement with the BAP denying any mistreatment of Debtor  
21 and stating that he did not intend to file an appeal brief or to  
appear at oral argument. In any event, Debtor's allegations are  
not relevant to the dismissal of his case, so we did not consider  
them for our decision.

22 <sup>6</sup> The cases filed by Debtor are as follows: (1) 11-16131,  
23 chapter 7 filed 5/18/11 jointly with wife, discharge entered  
8/23/11; (2) 11-49092, chapter 13 filed 9/15/11 jointly with wife,  
24 dismissed 10/24/11 at Debtors' request; (3) 11-61214, chapter 13  
filed 12/16/11 jointly with wife, dismissed 1/9/12 for failure to  
25 file schedules, statements and/or plan; (4) 14-31486, chapter 7  
filed 11/17/14, converted to chapter 13, dismissed on Debtor's  
26 request on 3/5/15 (while the instant case was pending).

27 <sup>7</sup> The cases filed by Debtor's wife are as follows:  
28 (1) 12-26895, chapter 13 filed 5/14/12, dismissed 7/27/12 for  
failing to confirm a plan; and (2) 13-16707, chapter 7 filed  
10/21/13, discharge entered 2/24/14.

1 counseling on March 21, 2011, nearly four years prior to the  
2 petition date. Debtor filed this same certificate again on  
3 May 12, 2015.

4 The United States Trustee ("UST") moved to dismiss Debtor's  
5 case under § 707(a) for failure to obtain prepetition credit  
6 counseling within 180 days prior to the filing as required under  
7 § 109(h)(1) ("Motion to Dismiss"). The certificate Debtor filed  
8 was stale, having been obtained nearly four years prior to the  
9 petition date. The UST requested that the case be dismissed with  
10 prejudice under § 349 and that a one-year refiling bar be imposed  
11 due to Debtor's alleged bad faith repeat filings, his alleged  
12 abuse of the bankruptcy system, and the fact that he, under oath,  
13 misled the court as to the timeliness of the taking of his  
14 prepetition credit counseling course. Any opposition to the  
15 Motion to Dismiss was due no later than July 9, 2015.

16 Concurrently with the Motion to Dismiss, the UST filed a  
17 motion under § 727(a)(8), seeking to deny Debtor's discharge  
18 because of the chapter 7 discharge entered less than eight years  
19 prior in August 2011. The Motion to Dismiss and the § 727(a)(8)  
20 motion were scheduled for hearing on the same day.

21 In his late opposition to the Motion to Dismiss filed on  
22 July 14,<sup>8</sup> Debtor asserted that he thought the prepetition credit  
23 counseling certificate could be used more than once; he did not  
24 know the course had to be completed every time before he filed a  
25 new bankruptcy case. Debtor also disputed the one-year refiling  
26 bar, stating that he did not intend to file any more cases.

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27 <sup>8</sup> Debtor did not file an opposition to the § 727(a)(8)  
28 motion.

1 Debtor indicated that he filed the instant case in good faith so  
2 he could negotiate a loan modification with his mortgage lender.

3 Subsequently, Debtor completed a credit counseling course on  
4 July 1, 2015, and filed his certificate of credit counseling on  
5 July 14, 2015. In reply to the Motion to Dismiss, the UST argued  
6 that Debtor's recent completion of credit counseling and filed  
7 certificate did not comply with § 109(h).

8 At the hearing on the Motion to Dismiss and the § 727(a)(8)  
9 motion, Debtor appeared pro se with an interpreter. After the  
10 parties stated they had nothing to add beyond the papers  
11 submitted, the bankruptcy court announced its oral ruling granting  
12 the Motion to Dismiss:

13 THE COURT: I think that the [UST's] arguments are well  
14 taken. I think that the debtor filed the bankruptcy case  
15 - - there's an indication that it's filed in bad faith  
16 because there's no basis for the Chapter 7 case when a  
17 discharge is not available to the debtor here; and it  
18 looks like the only basis is to stay a foreclosure while  
19 the debtor tries to work something out with the lender,  
20 but that's the only reason. There's no benefit to the  
21 Chapter 7 case for creditors here.

22 MR. FRANCO: The reason why I'm doing that is because I  
23 want to make a modification.

24 THE COURT: Right, right. Well, and the debtor is not  
25 entitled to a discharge because he had a discharge within  
26 the last four years. There've been more than one, two,  
27 three, four, five, six, six cases, including this one,  
28 within the last four years - - or not including this one.  
And I agree with the [UST] that it's not plausible for  
the debtor to have filed the case and not understood that  
he's not eligible for relief. So on that basis, I'm  
going to grant the motion by the [UST] as requested with  
the bar of one year for refileing.

25 Hr'g Tr. (July 23, 2015) 5:17-6:14. Because the court was  
26 granting the Motion to Dismiss, it denied the § 727(a)(8) motion  
27 as moot. Debtor timely appealed the dismissal order.

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**II. JURISDICTION**

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C. § 158.

**III. ISSUES**

- 1. Did the bankruptcy court err in dismissing Debtor's case for "cause" under § 707(a)?
- 2. Did the bankruptcy court abuse its discretion in dismissing Debtor's case with prejudice and imposing a one-year refiling bar?

**IV. STANDARDS OF REVIEW**

We review de novo whether a type of misconduct can constitute "cause" under § 707(a); we review for abuse of discretion the bankruptcy court's decision to dismiss a case for misconduct that constitutes "cause." Sherman v. SEC (In re Sherman), 491 F.3d 948, 969-70 (9th Cir. 2007). The decision to dismiss a bankruptcy case with prejudice and impose a filing bar is reviewed for abuse of discretion. See Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999). The bankruptcy court abuses its discretion if it applied the wrong legal standard or its findings were illogical, implausible or without support in the record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

We may affirm on any ground supported by the record, regardless of whether the bankruptcy court relied upon, rejected or even considered that ground. Fresno Motors, LLC v. Mercedes-Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014); Arnot v. Endresen (In re Endresen), 548 B.R. 258, 268 (9th Cir. BAP 2016).

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V. DISCUSSION

**A. The bankruptcy court did not err in dismissing Debtor's case for "cause" under § 707(a).**

**1. Dismissal for "cause" under § 707(a)**

A bankruptcy court may dismiss a chapter 7 case if the movant establishes "cause," which includes such conduct as (1) unreasonable delay in prosecuting the case, (2) failure to pay statutory fees and charges, or (3) failure to file financial disclosures. § 707(a)(1)-(3). Section 707(a) does not define "cause," but the Ninth Circuit has recognized that "cause" for dismissal is not limited to the three examples in the statute. Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1191 (9th Cir. 2000).

**2. The mandatory credit counseling requirement in § 109(h)**

Section 109 of the Code identifies who may be a debtor. To qualify as a debtor, an individual must first participate in a credit counseling session within 180 days before filing a petition. § 109(h)(1).<sup>9</sup> Section 109(h)(1) is implemented by § 521(b)(1) and Rule 1007(b)(3) and (c), which require a debtor to file a certificate from the credit counseling agency that provided

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<sup>9</sup> Specifically, § 109(h)(1) provides:

Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

1 the credit counseling within 14 days after filing the petition.  
2 The exceptions to this requirement are identified in § 109(h);  
3 none of them apply here.

### 4       **3. Analysis**

5       The bankruptcy court made no mention at the hearing of  
6 § 109(h) (1) or Debtor's failure to comply with it. It referred  
7 only to what it considered to be a bad-faith bankruptcy filing by  
8 Debtor. It is not clear from the transcript whether the court was  
9 finding bad faith as a basis for dismissal under § 707(a) or as  
10 support for its decision to dismiss Debtor's case with prejudice  
11 and impose the one-year refiling bar under §§ 349(a) and 105(a).  
12 The dismissal order states only that Debtor's case is "DISMISSED  
13 pursuant to 11 U.S.C. § 707(a)."

14       To the extent the bankruptcy court dismissed Debtor's case  
15 for bad faith, it erred. Bad faith does not constitute "cause"  
16 for dismissal under § 707(a). In re Padilla, 222 F.3d at 1194  
17 (reasoning that § 707(b) would not be necessary if "cause" under  
18 § 707(a) were meant to include bad faith). However, such error  
19 was harmless because another ground existed to dismiss Debtor's  
20 case for "cause" under § 707(a).

21       The UST argued that Debtor's case should be dismissed for  
22 cause under § 707(a) for failing to comply with the prepetition  
23 credit counseling requirement of § 109(h) (1). It is undisputed  
24 that the credit counseling certificate Debtor filed in the instant  
25 case was stale; it was nearly four years old. Debtor has not  
26 argued that any of the exceptions to § 109(h) applied. Debtor's  
27 subsequently-filed certificate indicating that he received credit  
28 counseling postpetition on July 1, 2015, did not cure his failure

1 to comply with § 109(h) (1).

2       The Ninth Circuit Court of Appeals has yet to rule on whether  
3 noncompliance with the prepetition credit counseling requirement  
4 in § 109(h) (1) establishes cause for dismissal under § 707(a).  
5 However, several courts have held that it does. See  
6 In re Alvarado, 496 B.R. 200, 207 (N.D. Cal. 2013) (relying on  
7 In re Padilla to hold that a chapter 7 debtor's failure to obtain  
8 prepetition credit counseling required by § 109(h) establishes  
9 "cause" for dismissal under § 707(a)); In re Tiner, 2008 WL  
10 2705103, at \*3 (Bankr. N.D. Cal. July 1, 2008); In re Dyer,  
11 381 B.R. 200, 206 (Bankr. W.D.N.C. 2007). Essentially, these  
12 courts agree that a debtor who fails to comply with Congress'  
13 mandate of prepetition credit counseling is not eligible to be a  
14 debtor and therefore dismissal is appropriate. See Gibson v.  
15 Dockery (In re Gibson), 2011 WL 7145612, at \*3-4 (9th Cir. BAP  
16 Dec. 1, 2011) (because chapter 13 debtor did not comply with  
17 prepetition credit counseling requirement she was not eligible to  
18 be a debtor and sua sponte dismissal of her case was appropriate,  
19 finding that the bankruptcy court lacks discretion to alter the  
20 requirement for those who have complied with the "spirit" of  
21 § 109(h), or where dismissal would result, in the court's view, in  
22 manifest injustice). This rule applies regardless of the chapter  
23 under which the individual debtor has filed. See Hedquist v.  
24 Fokkena (In re Hedquist), 342 B.R. 295, 300-01 (8th Cir. BAP 2006)  
25 (upholding dismissal of chapter 11 case for debtors' failure to  
26 comply with § 109(h)); In re Fanuzzi, 2011 WL 6097858, at \*2-3  
27 (Bankr. D. Mont. Dec. 7, 2011) (dismissing chapter 11 case for  
28 debtors' failure to comply with § 109(h)).

1           In Padilla, the Ninth Circuit set forth a two-part test for  
2 determining whether "cause" exists to dismiss a case under  
3 § 707(a), when the alleged conduct is not one of the three  
4 statutory examples. 222 F.3d at 1191-94. See In re Sherman,  
5 491 F.3d at 970 (applying Padilla two-part test). First, the  
6 court must determine whether the alleged misconduct is  
7 contemplated and addressed by a more specific Code provision. Id.  
8 If so, it does not constitute cause under § 707(a). Id. If not,  
9 then the court must consider whether the circumstances otherwise  
10 meet the criteria for "cause" for dismissal. Id.

11           We conclude that both prongs of Padilla are satisfied here.  
12 The first prong is satisfied because no other Code provision  
13 provides a remedy for a debtor's failure to satisfy the  
14 prepetition credit counseling requirement. See In re Alvarado,  
15 496 B.R. at 207. The second prong is satisfied because credit  
16 counseling is a mandatory prerequisite for an individual seeking  
17 bankruptcy relief without which he cannot sustain a case. As the  
18 bankruptcy court stated in Dyer, common sense dictates that  
19 statutory ineligibility to be a debtor would constitute "cause"  
20 for dismissal. 381 B.R. at 206.

21           Because Debtor did not obtain prepetition credit counseling  
22 during the 180 days prior to filing this bankruptcy case, he was  
23 not eligible to be a debtor under § 109(h). His ineligibility to  
24 be a debtor constitutes "cause" for dismissal under § 707(a).  
25 Accordingly, the bankruptcy court did not err in dismissing his  
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1 case.<sup>10</sup>

2 **B. The bankruptcy court did not abuse its discretion in**  
3 **dismissing Debtor's case with prejudice and imposing a**  
4 **one-year refiling bar.**

5  
6 **1. Governing law for dismissal with prejudice under**  
7 **§ 349(a)**

8 Once a court has determined that cause to dismiss exists, it  
9 must then decide what form of dismissal should apply. Ellsworth  
10 v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904,  
11 922 (9th Cir. BAP 2011). Section 349(a)<sup>11</sup> establishes a general  
12 rule that dismissal of a case is without prejudice, but expressly  
13 grants a bankruptcy court the authority to dismiss the case with  
14 prejudice which "bars further bankruptcy proceedings between the  
15 parties and is a complete adjudication of the issues."

16 In re Leavitt, 171 F.3d at 1223-24.

17 Upon a finding of bad faith, a bankruptcy court may dismiss a  
18 case with a permanent bar to refiling bankruptcy to discharge  
19 existing, dischargeable debt. Id. at 1224 (bad faith is "cause"  
20 for dismissal with prejudice under § 349(a)). Inherent in this  
21 authority is the power to impose a bar of shorter duration.

22 Johnson v. Vetter (In re Johnson), 2014 WL 2808977, at \*7 (9th  
23 Cir. BAP June 6, 2014) (citing Leavitt v. Soto (In re Leavitt),

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24 <sup>10</sup> To the extent Debtor contends the bankruptcy court erred  
25 by denying the discharge of his debts, he is mistaken. Although  
26 the UST alternatively sought relief under § 727(a)(8) based on  
27 Debtor's previous chapter 7 discharge, the bankruptcy court denied  
28 that motion as moot.

<sup>11</sup> Section 349(a) provides, in relevant part, that "[u]nless  
the court, for cause, orders otherwise, the dismissal of a case  
under this title does not . . . prejudice the debtor with regard  
to the filing of a subsequent petition under this title, except as  
provided in section 109(g) of this title."

1 209 B.R. 935, 942 (9th Cir. BAP 1997), aff'd, 171 F.3d 1219 (9th  
2 Cir. 1999) (§ 349(a) provides courts with authority to control  
3 abusive filings beyond the limits of § 109(g), even in cases where  
4 the bankruptcy court imposes a bar to refiling for a period  
5 greater than 180 days)). A finding of bad faith does not require  
6 fraudulent intent by the debtor. In re Leavitt, 171 F.3d at 1225.

7 When dismissing with prejudice courts are to consider the  
8 following factors: (1) whether debtor misrepresented facts in the  
9 petition, unfairly manipulated the Bankruptcy Code, or otherwise  
10 filed in an inequitable manner; (2) debtor's history of filing and  
11 dismissals; (3) whether debtor only intended to defeat state court  
12 litigation; and (4) whether egregious behavior is present. Id. at  
13 1224. Although Leavitt involved a chapter 13 case, we see no  
14 reason why the standards for a finding of bad faith in a chapter 7  
15 case should be any different. See In re Johnson, 2014 WL 2808977,  
16 at \*7 (applying Leavitt factors to chapter 7 dismissal with  
17 prejudice); In re Tiner, 2008 WL 2705103, at \*4 (same);  
18 In re Mitchell, 357 B.R. 142, 154 (Bankr. C.D. Cal. 2006) (same).

19 Although the bankruptcy court did not expressly refer to  
20 Leavitt to find that bad faith was present, it appears to have  
21 applied the standard set forth in Leavitt by finding that: (1) no  
22 basis existed for Debtor's chapter 7 case because no discharge was  
23 available nor was there any benefit to creditors; (2) Debtor had  
24 filed multiple bankruptcy cases in the past four years;  
25 (3) Debtor's sole purpose for filing this case was to stay a  
26 pending foreclosure; and (4) it was not plausible for Debtor to  
27 think he was eligible for relief.

28 It may have been plausible for Debtor to think he was

